repledge shall not be for an amount exceeding the indebtedness of the customer to the broker, since such disposition would operate to deprive the customer of immediate possession upon tender of the sum of his indebtedness. *Douglas* v. *Carpenter, supra.* Fourth, it is insisted that as stocks are a fluctuating property, the burden should not be upon the broker to call for more "margin," and to give reasonable notice of the time and place of sale. In most jurisdictions, however, and certainly on principle, evidence of a trade custom to sell without notice on exhaustion of "margin" is admissible. 6 COLUMBIA LAW REVIEW 365. Even in New York, where it is inadmissible, *Markham* v. *Jaudon, supra,* the broker may protect himself by special agreement with his customer. Dos Passos, Stock-Brokers, 114; *Baker* v. *Drake, supra.*

In contrast with this theory, the Massachusetts courts regard the broker as the owner of the shares upon a conditional executory contract to deliver them to the customer on demand and proper tender. *Wood* v. *Hayes* (1860) 15 Gray 375; *Covell* v. *Loud* (1883) 135 Mass. 41; *Weston* v. *Jordan* (1897) 168 Mass. 401. A like view of the similar "contango" transaction appears to have been taken in England by a lower court. *Bentinck* v. *London etc. Bank* [1893] 2 Ch. 120, esp. 140. Apart from the fact that if this construction were adopted it would become very questionable whether all "margin" transactions could not be set aside as mere wagers, Dos Passos, Stock-Brokers, 115, it is submitted that only by a perverted construction of the understanding of the parties, can the broker be regarded as the owner of the stock. The risk of the venture is the customer's solely. The dividends accruing are his. He pays interest upon the broker's advances. Any enhancement in value belongs to him. The broker is interested only to the extent of his commission. From every logical standpoint, therefore, the rejection of the Massachusetts view by the Supreme Court appears fortunate.

CONDITIONAL LIMITATIONS AFTER FAILURE OF PRIOR GIFT.—If a gift over be limited upon the performance of a condition, the gift cannot take effect unless the condition has been performed, though the first devisee die in the testator's lifetime. *Doo* v. *Brabant* (1792) 4 T. R. 706. Thus, if there be a devise to A, and if he die under twenty-one to B, and A die over twenty-one in the lifetime of the testator, there is a lapse. *Carpenter* v. *Heard* (1833) 14 Pick. 449. Since the ulterior disposition in such a case could not vest if the first devisee survived the testator, clearly it could not, if he predeceased him. *Savage* v. *Burnham* (1858) 17 N. Y. 561. On the other hand, if the condition has been performed, though in the testator's lifetime, the gift over takes effect. *Willing* v. *Baine* (1731) 3 P. W. 113. Difficulties in the application of these rules arose in a series of cases beginning with *Jones* v. *Westcombe* (1711) Pre. Ch. 316. In that case there was a bequest to a child with whom the testator's wife was *enceinte,* and, if such child die under twenty-one, gift over to B. The wife proved not to have been *enceinte,* but the court held, without assigning a reason, that the bequest over took effect. In *Gulliver* v. *Wickett* (1745) 1 Wils. 105, construing the same will, it was said that "whether the limitation to the

child never took effect, or whether it did, and was determined, is the same thing." Strictly, the two are not the same. *Roe* v. *Fulham* (1741) Willes 303, 309. In the final analysis the case must be explained upon the ground that the manifest intention of the testator was that the gift over should take effect if the son were not living at majority, or that by necessary implication the condition expressed included the contingency of there being no child. In either view the condition was performed. Cf. *Mackinnon* v. *Sewell* (1833) 2 My. & K. 202. The doctrine of *Jones* v. *Westcombe, supra,* was applied where there was a gift over in case the first devisee leave only one child, and no child was left. *Murray* v. *Jones* (1813) 2 Ves. & B. 313, and where there was a gift over, if the first devisee failed to do a certain act after the testator's death. *Scatterwood* v. *Edge* (1689) 1 Salk. 229; *Avelyn* v. *Ward* (1749) 1 Ves. 420. The line was more closely drawn between these cases and those like *Doo* v. *Brabant, supra,* where there was a void gift to a charity, and, if a certain event should not occur, gift over. In *Philpott* v. *St. George's Hospital* (1846) 21 Beav. 134, the condition was that a suitable piece of ground should be provided. The land was provided, and therefore the gift over was not given effect. This case was considered by the House of Lords in *Hall* v. *Warren* (1861) 9 H. L. C. 420 [see *Warren* v. *Rudall* (1858) 4 K. & J. 603, in the lower court] where the gift over was to take effect in case a committee should not be appointed. No committee was in fact appointed, and upon this narrow ground the case was decided. But two of the lords agreed with the lower court that the case also came within the principle of *Jones* v. *Westcombe, supra,* and evinced a disposition to overrule *Philpott* v. *St. George's Hospital, supra,* despite the fact that there the expressed condition had been performed. Rules drawn from the immediately preceding cases, by their terms apparently applicable to all in which the prior disposition has failed, naturally have led to confusion. Following Lord Hardwicke's statement in *Avelyn* v. *Ward, supra,* that "if the preceding limitation by what means soever is out of the case, the subsequent limitation takes place," Fearne, Con. Rem. (6th Ed.) 360, lays down the rule that where there is a devise over after a preceding limitation, or upon a condition annexed to a preceding estate, if the preceding estate could not take effect, the disposition over nevertheless will take place, because, in order to give effect to the subsequent limitation, the preceding estate is not to be considered as a condition. If taken literally this would invalidate the result reached in cases like *Doo* v. *Brabant, supra,* for in all of them the first disposition is doubtless out of the way. That this is not the true doctrine of the English courts is shown by the fact that *Doo* v. *Brabant, supra,* has been consistently followed. *Humberstone* v. *Stanton* (1813) 1 Ves. & B. 385; *Wing* v. *Angrave* (1860) 8 H. L. C. 183; *Elliott* v. *Smith* (1878) 22 Ch. Div. 236. Whatever may be considered the exact line of demarcation, *Mackinnon* v. *Sewell, supra; Warren* v. *Rudall, supra,* the principle of *Jones* v. *Westcombe* cannot be applied where, if the first devisee had been in existence, or if in existence legally qualified to take, the event had occurred upon which his estate was to become absolute. Cf. 2 Jarman, Wills, 833, 835.

In a recent New York case a testatrix devised her estate to A for life,

at A's death one half to B. and if B die before A, then to B's children. B died after A, and both died before the testatrix. The court, following Fearne's rule, *supra,* repeated in *Norris* v. *Beyea* (1855) 13 N. Y. 273, and in later cases, held that the limitation to the children of B took effect, despite the non-performance of the condition. *U. S. Trust Co. of N. Y.* v. *Hogencamp* (1908) 191 N. Y. 281. But in *Norris* v. *Beyea, supra,* the condition had been literally performed; likewise, in *Downing* v. *Marshall* (1861) 23 N. Y. 366; *McLean* v. *Freeman* (1877) 70 N. Y. 81; *Wager* v. *Wager* (1884) 96 N. Y. 164; *Miller* v. *Winship* (1899) 161 N. Y. 71. On the other hand, in *Savage* v. *Burnham, supra,* where the testator devised the beneficial interest in a trust estate to his children, and if any of them should die under twenty-one, his share to be divided among the remaining children, and two of the sons died after attaining twenty-one, it was held in accordance with *Doo* v. *Brabant, supra,* that the gift over did not take effect. This decision seems to have been overlooked by the court in the principal case. *Williams* v. *Jones* (1901) 166 N. Y. 522, affords some apparent justification for the result reached. In that case a testatrix, evidently attempting to provide for all possible contingencies, made an ultimate disposition of the beneficial interest of a trust estate, if (1) A left surviving both wife and son, (2) only son, (3) neither of them, and in any case no issue of the son. The wife only was left. It was held, reversing the decision of the lower court, that, though none of the events provided for had occurred, the general scheme of the will showed a clear intention to make the disposition over dependent not upon the order of deaths of the *cestuis que trustent,* but upon their deaths and that of one of them without issue. Conceding this to be the correct construction, and the efforts of the testatrix to leave no contingency unprovided for points strongly to its soundness, the condition was in fact performed. In the principal case, however, there appears no evidence to show that an express condition was not intended to operate as such. The modern tendency of American courts to effectuate as fully as possible that which they consider the intention of the testator, in disregard of express terms of the will, *Young Women's Christian Home* v. *French* (1902) 187 U. S. 401, may be justified in *William* v. *Jones, supra,* but the principal case illustrates a dangerous tendency to substitute conjecture for express intention.

DETERMINATION OF RIGHTS IN CHURCH PROPERTY.—Lord Eldon's view, apparently founded upon religious conditions peculiar to England, that civil courts must decide for themselves all questions of creed, *Attorney-General* v. *Pearson* (1817) 3 Meri. 353, has never received judicial sanction in this country. *Watson* v. *Jones* (U. S. 1871) 13 Wall. 679, 733; see 6 COLUMBIA LAW REVIEW 137. The policy of American courts has confined the determination of ecclesiastical questions as far as possible to church tribunals. *Chase* v. *Cheney* (1871) 58 Ill. 509. Logical adherence to this policy would exclude any consideration of such questions except where civil rights are involved. *White Lick etc.* v. *White Lick etc.* (1883) 89 Ind. 136. Civil courts may not, however, avoid questions of creed, if necessary for the determination of property rights. But in no case will courts